90-1437

No._____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

FREDERICK LEON DOTSON - PETITIONER

VS.

UNITED STATES OF AMERICA - RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a summary dismissal, finding procedural defaults of enumerated factual grounds for habeas corpus relief, violates due process where the summary dismissal affords no opportunity for the Section 2255 Movant to show cause and prejudice with respect to the procedural defaults?

2. Whether Batson violations occurred where the trial judge refused to conduct the Batson inquiry during voir dire; where the prosecutor's articulation, given at the end of the last day of trial, was neither nondiscriminatory nor clear and specific, and where defense counsel had no fair opportunity to show pretext?

3. Whether Batson violation occurred when the trial court transferred venue of trial (intra-district) resulting in a systematic exclusion of blacks from the jury?

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

FREDERICK LEON DOTSON,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, Frederick Leon Dotson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit. The judgment and opinion affirm the denial of Dotson's motion for habeas corpus relief pursuant to 28 U.S.C. § 2255, finding that Dotson fails to show cause and prejudice for procedural defaults regarding 22 enumerated factual grounds for relief, including systematic exclusion of blacks from the jury selection process (with Batson violations), and ineffective assistance of counsel.

OPINIONS BELOW

The opinion of the Court of Appeals is cited as United States of America v. Frederick Leon Dotson, No. 90-1243 Summary Calendar (5th Cir. August 13, 1990), and it appears as Appendix B to this Petition. The unpublished memorandum opinion of the District Court for the Northern District of

Mississippi appears as Appendix D to this Petition. It is Dotson's contention that intolerable defects and injudicious shortcuts are reflected throughout these opinions.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on August 13, 1990. A timely Petition for Rehearing and a Suggestion for Rehearing EnBanc was filed on August 27, 1990. The Court of Appeals' denial of the Petition for Rehearing and Suggestion For Rehearing EnBanc was issued on November 1, 1990, and is set forth in Appendix A. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fundamental due process of law, the right to counsel, and equal protection of the law, provided by way of Amendments V and VI to the United States Constitution, are at issue. Rules 2, 4, and 8 of the Rules Governing Section 2255 Proceedings in

the United States District Courts are applicable.

STATEMENT OF THE CASE

Dotson filed two motions for section 2255 relief. In March, 1989, his first motion asserted the ineffective assistance of counsel. His second motion, filed less than 30 days later, enumerated more than 20 factual grounds for relief. For the second motion, Dotson followed the express requirement of Rule 2, Rules Governing Section 2255 Proceedings.

This is to say, Dotson used the form annexed to the rules. Item 12 on the form directs Dotson to state concisely every ground on which Dotson claims he is being held unlawfully. Dotson is directed further to briefly summarize the facts supporting each ground.

With his second motion, Dotson moved (in writing) the trial court to allow discovery regarding blacks and the jury selection process and to expand the record.

Dotson submitted memoranda of authorities supporting each motion. Dotson attached a proposed order requiring the United States Attorney to answer the 2255 motion.

There was no prompt response from the trial court. After more than eleven months, the trial court issued its summary dismissal. The trial court overlooked Dotson's motions for discovery and expansion of record. The court indicated that it was applying Rule 4 of the Section 2255 rules, entitled "Preliminary Consideration by Judge." The court concluded that it plainly appeared on the face of the motion that Dotson was not entitled to relief. In its order dismissing Dotson's motion, the court took a short cut and indicated it was applying Rule 8 of the Section 2255 rules, entitled "Evidentiary Hearing."

The gist of the trial court's dismissal was that each factual ground urged by Dotson either had been decided

already, lacked support in the record or was not a constitutional violation. The trial court repeatedly referred to procedural defaults and ruled that Dotson did not show cause and prejudice (in his "form approved" 2255 motion). On appeal, the Court of Appeals adopted the trial courts findings, viz., that Dotson had failed to show cause and prejudice for the procedural defaults. The Appeals Court findings are particularly disturbing in that it also ignored several evidentiary motions submitted to it by Dotson. The Court overlooked Dotson's Motion for Judicial Notice of the Jury Venire Panel and Petit Jury in USA v. Lance (a comparable case to Dotson's but Dotson is black and Lance is white), and the Court overlooked Dotson's Motion for Judicial Notice of relevant Jury Selection Reports. See Appendix F.

The lower courts have denied Dotson's motion for relief - after affording him nothing more than the chance to submit the

2255 motion on the authorized form. Dotson's efforts to get evidence into the record have been overlooked and turned back. The courts have found that no systematic exclusion of blacks occurred, i.e., no Batson violations, and that Dotson fails to show cause and prejudice for purported procedural defaults.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for multiple reasons: The opinion below directly frustrates the Rules Governing Proceedings in the United States District Courts under 28 U.S.C. Section 2255; the opinion reflects a dramatic and erroneous contraction of substantive due process; and the opinion conflicts, by implication, with previous decisions of this Court as well as decisions of the same circuit, i.e., the Fifth. This case presents an opportunity for this Court to use its supervisory power over federal courts, along with its appellate jurisdiction, to preserve the

sanctity of the Section 2255 rules.

Secondly, this case presents an opportunity for this Court to clarify, for purpose of federal habeas review, the procedural steps associated with raising issues of procedural defaults as to grounds for relief, with showing cause and prejudice to overcome defaults, and using the ineffective assistance of counsel as cause and prejudice.

Thirdly, this case allows the Court to reinforce Batson v. Kentucky, particularly the timing of the Batson inquiry and the need for the prosecutor's articulation to be legitimate, nondiscriminatory, clear, and specific. This Court can likewise address issues regarding unexplained, intra-district transfer of trial which results in a systematic exclusion of blacks from the jury. See Mallet v. Missouri, _____ U.S. _____ 110 S.Ct. 1308 (1990), certiorari denied.

The record shows that the Appeals

Court has approved the trial judge's reversible judicial error in dismissing Dotson's Section 2255 motion. The ruling is that procedural defaults occurred, but the ruling did not afford Dotson a fair opportunity to refute the existence of the procedural defaults or to show cause and prejudice. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621 (1977); Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068 (1963); Machibroda v. United States, 368 U.S. 487, 82 S.Ct. 510 (1962); United States v. Birdwell, 887 F.2d 643 (5th Cir. 1989); United States v. Atkins, 834 F.2d 426 (5th Cir. 1987); United States v. Daly, 823 F.2d 871 (5th Cir. 1987); United States v. Edwards, 711 F.2d 633 (5th Cir. 1983; Alford v. United States, 709 F.2d 418 (5th Cir. 1983); Mack v. Smith, 659 F.2d 23 (5th Cir. 1981); United States v. Auten, 632 F.2d 478 (5th Cir. 1980); Clark v. United States, 606 F.2d 550 (5th Cir. 1979); Friedman v. United States, 588 F.2d 1010 (5th Cir. 1979); United States v. Guerra,

588 F.2d 519 (5th Cir. 1979); Johnson v. United States, 567 F.2d 634 (5th Cir. 1978); Hart v. United States, 565 F.2d 360 (5th Cir. 1978); Dupart v. United States, 541 F.2d 1148 (5th Cir. 1976); Summers v. United States, 538 F.2d 1208 (5th Cir. 1976);McKnight v. United States, 507 F.2d 1034 (5th Cir. 1975); Reagor v. United States, 488 F.2d 515 (5th Cir. 1973); Montgomery v. United States, 469 F.2d 148 (5th Cir. 1972); and Brown v. United States, 462 F.2d 681 (5th Cir. 1972). See also Rules Governing Proceedings in the United States District Courts Rule 4, entitled "Preliminary Consideration by Judge."

By showing ineffective assistance of counsel, Dotson establishes cause for procedural defaults. Even an isolated error by counsel can amount to ineffective assistance. Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639 (1986). The trial court enumerated error upon error committed by Dotson's trial counsel. The absence of

prejudice from ineffective assistance of counsel may not be established by asserting that no single error considered alone significantly impaired the defense. Nevertheless, prejudice can be shown from the cumulative impact of multiple errors. See Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978).

There is no reason to disallow Dotson full opportunity to utilize ineffective assistance of counsel to show cause and prejudice. Dotson, in fact, names ineffective assistance as an independent ground for relief. No state court is involved. In Murray v. Carrier, supra, the Court explained:

> ". . . The exhaustion doctrine which is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings," Rose v. Lundy, 455 U.S. 509, 518, 102 S. Ct. 1198, 1203, 71 L.Ed.2d 379 (1982), generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. The question whether there is cause

> for a procedural default does not pose any occasion for applying the exhaustion doctrine when the federal habeas court can adjudicate the question of cause - a question of federal law - without deciding an independent and unexhausted constitutional claim on the merits." 106 S.Ct. at 2646.

Dotson, as a Section 2255 Movant, is certainly entitled to notice and opportunity to show cause and prejudice.

As to Batson violations, the trial judge transferred venue of Dotson's trial from the Greenville Division to the Western Division of the Northern District of Mississippi. Dotson is a black man who was to be tried for criminal activity occurring in the Greenville Division. At least 58% of the residents in the Greenville Division are black. In the Western Division, blacks are less than 30%. Only six blacks were on Dotson's jury venire panel and only one black was on the petit jury itself. The unexplained trial removal caused a 28% negative impact in respect to blacks being on the jury venire panel. Batson

violations occurred. See Mallet v. Missouri, ____ U.S. ____, 100 S. Ct. 1308 (1990).

Peremptory challenges by the prosecution applied to five blacks. Only one peremptory challenge applied to a white. Defense counsel objected to the challenges on Tuesday, October 25, 1985. The court refused to address the issues at that time. When the trial ended on Wednesday, October 23, 1985, the court indicated that a prima facie case of discrimination existed. The court inquired of prosecution -- as is required by Batson -- but afforded no fair opportunity for defense counsel to show that the prosecution's articulation for his suspect challenges was pretext. Defense heard the articulation (for the first time) in one minute and was asked to show pretext (or rebuttal) the next minute. Under the lead case establishing the evidentiary techniques to uncover illegal discrimination, McDonnell Douglas Corp. v.

Green, 411 U.S. 802, 93 S.Ct. 1817 (1973), Dotson's defense counsel was entitled to a fair opportunity to show that the stated reasons for the tainted peremptory challenges were in actuality pretextual. No fair opportunity was afforded under the circumstances. Even worse, the prosecution was afforded the opportunity to use ex-post facto justification for the discrimination when the court failed to immediately inquire for the prosecution's articulation upon defense counsel establishing a prime facie case of discrimination. Overall, the meaningful procedure required by Batson was violated in that the procedure followed was only illusory.

Even more to the point, the prima facie showing or racial discrimination by the prosecutor (i.e., striking five blacks, one after the other) was not legally rebutted by the articulations voiced by the prosecutor. For instance, the prosecutor accepted Juror 1, a white person, but was

told Juror 1 had been stricken for cause -- he could not read. Juror 12, a black person, the prosecutor struck, articulating that "he is likely to turn a drug dealer loose." On Juror 14, a black person, the prosecutor articulated, "She might not make a good juror." On Juror 15, a black person, the prosecutor said, "He cannot read." White Juror 1, however, could not read, but the prosecutor accepted him, only to be told that inability to read removes a juror for cause, and that the first juror (white) had been removed. Juror 19, a black person, was stricken, the prosecutor explaining that he couldn't read well and had been arrested for rape. Juror 24, a black person, was accepted by the prosecution. Juror 28, a black person, was stricken, prosecutor saying she would not make a good juror in that her family was frequently involved in disturbance calls.

In Texas Department of Community Affairs v. Burdine, 450 U.S. 253, 101 S.Ct. 1089 (1981), the court explained that in

discrimination analysis, a prima facie case creates a rebuttal presumption of discrimination and if not rebutted, requires a finding of illegal discrimination. Burdine also mandates that the articulation of reasons be clear and reasonable specific.

In striking the black persons from the jury venire panel, the prosecutor articulated that his office checked with law enforcement officials in the black juror's home county and that the law enforcement officials believed the black person "would not make a good juror." Such articulation is simply inadequate. Its inadequacy is more pronounced when it is compared to the prosecutor's articulation for striking the white juror. There the articulation was that he (himself) had talked to the named sheriff in the white juror's home county and that the sheriff stated that the white juror's son was involved in selling drugs. Notably, the sheriff did not indicate to the prosecutor

whether the white person would make a good juror or not! Overall, the preponderance of the evidence reveals a racially, victimized situation. Batson violations occurred as a matter of law.

This Court should grant certiorari. Without certiorari review, all the defects and injudicious shortcuts outlined above will go unchallenged, destined to be repeated many times, in the administration of criminal justice and habeas corpus review.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the opinion of the Court of Appeals in this matter.

DATED:

Respectfully submitted,

Harden King

HARDEN KING, Esquire
Attorney for Petitioner

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 90-1243
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

FREDERICK LEON DOTSON,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Mississippi

(November 1, 1990)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before POLITZ, DAVIS and BARKSDALE, Circuit Judges.

PER CURIAM:

After considering petitioner's Application for Rehearing, we delete section

B(3) of our Opinion (located at pages 4 and 5). We substitute the following in place of the deleted material:

> 3. Underrepresentation of blacks on the trial jury and improper use of preemptory challenges by the prosecutor:
>
> Dotson did not raise any issue on direct appeal as to the prosecutor's use of peremptory challenges, the racial composition of the jury which tried him, or the timing of the trial court's conduct of the procedure required by Batson v. Kentucky, 476 U.S. 79 (1986). Nor has Dotson asserted any cause for not raising the issue and actual prejudice resulting therefrom. Therefore, he cannot raise these issues for the first time on collateral review.

The Petition for Rehearing and Petition for Rehearing En Banc are otherwise DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 90-1243
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

FREDERICK LEON DOTSON,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Mississippi
(WC89-32-B (CR #CRG85-47)

(August 13, 1990)

Before POLITZ, DAVIS AND BARKSDALE, Circuit Judges.

DAVIS, Circuit Judge:[1]

Frederick Leon Dotson (Dotson) appeals the district court's denial, without an

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

evidentiary hearing, of his 28 U.S.C. § 2255 motion. We affirm.

I.

Dotson was charged with one count of conspiracy to possess and distribute cocaine and marijuana in violation of 21 U.S.C. §§ 841(a)(1), (b) and 846; two counts of attempted tax evasion in violation of 26 U.S.C. § 7201; six counts of possession and distribution of marijuana in violation of 21 U.S.C. §§ 841(a), (b); and one count of possession of cocaine in violation of 21 U.S.C. § 844. A jury convicted Dotson on all counts. The district court later set aside the cocaine possession conviction upon discovering that the guilty verdict on that count had been mistakenly returned by the jury. On direct appeal, this court affirmed the conviction. United States v. Dotson, 817 F.2d 1127, vacated, in part, reh'g denied, in part, 821 F.2d 1034 (5th Cir. 1987).

In March 1989, Dotson filed a motion to

vacate his conviction pursuant to 28 U.S.C. § 2255. In April 1989, Dotson filed a second § 2255 motion. In March 1990, the district court denied Dotson's motions without an evidentiary hearing. Dotson filed a timely appeal.

II.

A.

Dotson first argues that the district court erred in denying his motion without an evidentiary hearing. A district court is to hold a hearing "unless the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief." Rules Governing Section 2255 Proceedings in the United States District Courts 4(b). Dotson also contends that without such a hearing he was not able to show cause for his attorney's failure to make certain objections and was not able to describe the resulting prejudice because the form he was required to use in filing his § 2255 motion only required the movant to state

the factual ground on which relief is claimed and the official form does not refer to cause and prejudice.

The district court did not err in deciding the motion without a hearing because, as explained below, Dotson is clearly entitled to no relief.

B.

Dotson argues numerous grounds for relief. We adopt the district court's reasoning for many of these claims, however, we consider each in turn, combining related claims.

1. Underrepresentation of blacks on the grand jury:

For the reasons stated by the district court, we conclude that Dotson is not entitled to relief. (pp. 2-5)

2. The intra-district removal of trial was prejudicial:

Dotson argues that the transfer of the trial from the Greenville division to the Western division of the district was an abuse of discretion because his attorneys and

witnesses were located in the Greenville division and the transfer, therefore, prevented counsel from effectively representing him. Dotson also argues that the transfer was prejudicial because blacks comprise a smaller proportion of the population in the Western division.

"[T]here is no right to trial within a particular division in a district," and the trial judge has broad discretion in making a transfer. United States v. Weddell, 800 F.2d 1404, 1406 (5th Cir. 1986), reh'g on other grounds, 804 F.2d 1343, aff'd after remand, United States v. Hammond, 815 F.2d 302 (5th Cir. 1987). "[T]ravel and lodging expenses for lawyers and witnesses do not constitute prejudice sufficient to overcome a district court's determination regarding the place of trial." United States v. Kaufman, 858 F.2d 994, 1000 (5th Cir. 1988). Dotson does not point to any instance in which the location of the trial caused counsel's performance to be deficient and resulted in prejudice. See

Strickland v. Washington, 466 U.S. 668, 694 (1984).

Furthermore, Dotson waived the ability to assert error on this ground because he did not raise the issue prior to trial. United States v. Greer, 600 F.2d 468, 469 (5th Cir. 1979), cert. denied, 444 U.S. 902 (1979).

3. Underrepresentation of blacks on the trial jury and improper use of preemptory challenges by the prosecutor:

For the reasons stated by the district court, we conclude that Dotson is not entitled to relief. (p. 6-10)

In addition, with regard to Dotson's contention that the proceeding in which the prosecutor explained the reason for exercising preemptory challenges against blacks must take place during voir dire, the cases cited by Dotson are inapplicable. Blackshear v. State, 521 So.2d 1083 (Fla. 1988) and Stubbs v. State, 540 So. 2d 255 (Fla. App. 1989) state the rule established by the Florida Supreme Court for Florida trial courts and have no application to trial procedure in the federal district court.

Finally, Dotson argues in this § 2255 motion that there was a 10% disparity between the number of blacks eligible to serve on the jury and the number of blacks who served on the jury panel.[2] Dotson is not entitled to relief. This court has dismissed similar allegations predicated on an even greater disparity where, as here, the defendant had not shown that the selection process was improper. United States v. Ward, 610 F.2d 294, 295 (5th Cir. 1980).

4. The jury plan was violated:

Dotson argues that the district court violated the jury selection plan because the jury plan provided for separate master jury wheels for each division within the district but Dotson's jury was drawn from the district as a whole. The steps set out in the Jury Selection Act of 1968, 28 U.S.C. § 1867, provide the exclusive mechanism for challenging the selection procedure. Id. at

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[2] On Appeal, Dotson argues that an 18% disparity exists, however, we will not consider arguments raised for the first time on appeal.

§ 1867(e). The defendant must file a "motion . . . containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of [the Act.]" Id. at § 1867(d). The challenge must be made "before voir dire examination begins, or within seven days after the defendant discovered. . . the grounds, therefor, whichever is earlier." Id. at § 1867(a).

Dotson did not raise any challenge to the jury selection procedure until he filed his § 2255 motion. In his original motion Dotson merely alleged that the jury plan was violated but did not contend that the selection procedure was motivated by or resulted in racial discrimination. In conclusory language, Dotson argues, for the first time on appeal, that the procedure contributed to the systematic exclusion of blacks. Because Dotson did not raise this objection in timely fashion, the district court did not err in rejecting this claim.

5. Improper prosecutor's statements:

For the reasons stated by the district court, it correctly rejected this claim. (p. 14-15)

6. Trial judge's erroneous factual statements:

For the reasons stated by the district court, it correctly rejected this claim. (p. 15)

7. Defective multi-count indictment:

For the reasons stated by the district court, it correctly rejected this claim. (pp. 2-3, 5)

8. Joinder of offenses in the same count:

Dotson argues that it was improper to charge him, in a single count (Count One), with conspiracy to distribute both a narcotic drug, cocaine, and a non-narcotic drug, marijuana. Dotson contends that, because there was insufficient evidence to support a conviction for distribution of cocaine demonstrated by the jury's acquittal of him on the cocaine charge in Count Ten, the jury's verdict on Count One is ambiguous and therefore conviction on this count is

invalid.

Dotson's trial counsel filed a motion for a new trial on grounds that the verdict was not supported by substantial evidence. The trial court denied the motion. Although Dotson did not make a sufficiency of the evidence argument in his direct appeal, this court observed that there was "overwhelming evidence demonstrating that Dotson conspired to possess with intent to distribute marijuana." Dotson, 817 F.2d 1127. "[W]hen a conspiracy to violate two or more statutes is alleged, the jury may return a verdict of guilty if they find beyond a reasonable doubt that a conspiracy to violate any one of the statutes existed." United States v. Elam, 678 F.2d 1234, 1250 (5th Cir. 1982). The district court correctly rejected his claim.

9. Erroneous jury instruction:

For the reasons stated by the district court, it correctly rejected this claim. (pp. 10-13)

10. Inadmissible evidence:

For reasons stated by the district

court, it correctly rejected this claim. (pp. 13-14)

11. Pre-indictment delay:

Dotson contends that he was prejudiced by pre-indictment delay. The district court did not err in concluding that, due to the ongoing nature of the investigation, there was not sufficient delay to warrant dismissal.

Furthermore, "to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." United States v. Lovasco, 431 U.S. 783, 796 (1977). The defendant must allege "actual prejudice to the conduct of the defense" and that "the Government intentionally delayed to gain some tactical advantage." United States v. Marion, 404 U.W. 307, 325 (1971). Dotson made no such allegations. The district court correctly rejected this claim.

12. Misleading Identification of an informant:

For the reasons stated by the district court, it correctly rejected this claim. (pp. 14-15)

13. Prosecution's failure to disclose favorable evidence:

Dotson contends that the record shows that the prosecutor withheld records in violation of Brady v. State of Maryland, 373 U.S. 83 (1963). Although Dotson does not support this allegation with record citations, he contends that the government was required to produce records of the taxes Dotson had paid since the government presented evidence of unpaid taxes. Dotson knew or clearly should have known what taxes he had paid. "[W]hen the information is fully available to the defendant and his reason for not obtaining and presenting the information is his lack of reasonable diligence, the defendant has no claim under Brady." Mattheson v. King, 751 F.2d 1432, 1444 (5th Cir. 1985). The district court correctly rejected this claim.

14. Acquittal of co-defendant:

Dotson contends that the dismissal of charges against his co-defendant, Wade Dotson, for aiding and abetting is equivalent to an acquittal and, therefore, his own conviction constituted a denial of due process. The disposition of Wade Dotson's case is irrelevant. "[A]ll participants in conduct violating a federal criminal statute are 'principals.' As such, they are punishable for their criminal conduct; the fate of other participants is irrelevant." Standefer v. United States, 447 U.S. 10, 20 (1980).

15. Concurrent sentences:

For the reasons stated by the district court, it correctly rejected this claim. (p.16)

16. Newly discovered evidence:

Dotson alleges that newly discovered evidence would show that he could not have made the sale of drugs that is the subject of his conviction on Count Eight of the indictment. In particular, he points to

hotel receipts that show that he was out of town attending his father's funeral.

In order to justify relief the newly discovered evidence must: (1) be discovered following trial; (2) be accompanied by an allegation of facts from which the court could infer that with diligence, petitioner could not have discovered the evidence before trial; (3) not be merely cumulative or impeaching; (4) be material; and (5) be such that a new trial would probably produce a new result. United States v. Martino, 648 F.2d 367, 406-07, vacated, in part, on other grounds,United States v. Holt, 650 F.2d 651 (5th Cir. 1981), cert. denied, 456 U.S. 943 (1982).

Dotson obviously knew when the funeral occurred if he attended. He testified at trial that he stayed at the hotels for which he now apparently has receipts, thus he knew the evidence existed before trial and could have obtained it with due diligence. Furthermore, the evidence is merely

cumulative to his trial testimony and would not likely produce a new result.

17. Ineffective assistance of counsel:

In his first § 2255 motion, Dotson argued that he was deprived of effective assistance of trial counsel in violation of his sixth amendment rights and he cited several grounds for this contention. In his appellate brief, for the first time, he contends that in each instance the district court denied habeas relief because Dotson's counsel failed to object to one of the alleged errors (discussed above) Dotson received ineffective assistance; Dotson also argues for the first time that appellate counsel was ineffective. We will not consider arguments made for the first time on appeal and, therefore, only consider the errors Dotson alleged in his § 2255 motion.

In order to prevail on an ineffective assistance claim Dotson must show: (1) deficient performance by counsel; and (2) prejudice. Strickland v. Washington, 466 U.S. 668 (1984).

Dotson first cites several instances where this court, in considering Dotson's direct appeal, indicated that trial counsel had failed to preserve an error by objecting at trial. Even though this court noted that Dotson's counsel had failed to raise certain objections, "[o]ut of an abundance of caution" the court went on to consider the merits of Dotson's claims of error in all but one instance. Dotson, 817 F.2d at 1132. Where we rejected Dotson's claim of error on the merits, counsel's failure to object either did not constitute ineffective assistance or, even if his performance was deficient, Dotson was not prejudiced.

The one request that Dotson's counsel failed to make, which prevented the appellate court from reviewing the issue was that counsel did not ask the district court to excise parts of a document which contained damaging information. The document was a state law enforcement officer's report of an interview she conducted with I.V. Young, who had been a "runner" for Dotson. The trial

court admitted the report in evidence (over Dotson's hearsay objection) to reaffirm Young's credibility. The report contained a statement Young had previously made, which was consistent with his testimony at trial, but it also contained a number of damaging statements about Young's work for Dotson. On rehearing we concluded that the district court erred in admitting this hearsay evidence but determined that this evidence was "whispers in a rainstorm." Dotson, 821 F.2d 1036. Assuming, without deciding, that counsel's performance was deficient for failing to move to exclude portions of the document, Dotson has not persuaded us that this prejudiced his case so that "there is a reasonable probability that the outcome of the trial has been undermined and the result would have been different." Strickland, 466 U.S. at 687.

Dotson next contends that he received ineffective assistance of counsel because trial counsel did not challenge the allegedly

inconsistent jury verdict with regard to the cocaine charges in Counts One and Ten. Because we have addressed and rejected this contention on the merits (see discussion of error number 8 above), it can not serve as the basis for an ineffective assistance claim.

Finally, Dotson contends that his counsel provided ineffective assistance by failing to object to Dotson's sentence. Dotson argues that he "is doing 15 years when at best he should be doing 9." He does not explain why nine years is a more appropriate sentence than fifteen years other than to say this was "essentially a marijuana case of small proportions." Nor does he point out what arguments trial counsel could have made that would have led to a decrease in Dotson's sentence.

We conclude that the district court did not err in denying both of Dotson's § 2255 motions.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

FREDERICK LEON DOTSON	)	
	)	
Criminal # CRG85-46	)	
Reference # CRG85-47	)	
	)	
V.	)	WC89-32-B
	)	
UNITED STATES OF AMERICA	)	

ORDER

In accordance with the memorandum opinion issued this day, it is ORDERED:

That the § 2255 motions are hereby DENIED without an Evidentiary Hearing.

THIS, the 22nd day of March, 1990.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

FREDERICK LEON DOTSON	)	
	)	
Criminal # CRG85-46	)	
Reference # CRG85-47	)	
	)	
V.	)	WC89-32-B
	)	
UNITED STATES OF AMERICA	)	

MEMORANDUM OPINION

This cause comes before the court on Frederick Leon Dotson's motions to vacate, set aside or correct the sentences imposed in Cause No. CRG85-47-B pursuant to 28 U.S.C. § 2255. After a one-week trial, Dotson was convicted of one count of conspiracy to distribute and possess with intent to distribute marijuana and cocaine, six counts of distribution of and possession with intent to distribute marijuana, and two counts of willful evasion of federal income taxes. 21 U.S.C. § 841(a) and (b); 21 U.S.C. § 846; 26 U.S.C. § 7201. Dotson's first motion, filed by his attorney, alleges ineffective

assistance of counsel and requests an order vacating the convictions and sentences and granting a new trial or, in the alternative, a reduction of sentences from a total of fifteen to nine years. Through different counsel, Dotson filed a second motion alleging a defective indictment, unconstitutionally selected grand and petit juries, due process violations, double jeopardy, and other errors. The two motions will be considered together and the issues raised in both motions addressed. See Rule 9(b) of the Rules Governing § 2255 Cases (allowing dismissal of successive motions).

I. Defects in the Grand Jury, Petit Jury and Indictment

Dotson's second motion alleges that the selection of the grand jury and petit jury arrays was racially discriminatory and that the selection of the petit jury array violated this district's jury plan. Dotson makes conclusory allegations that the trial setting in Oxford was arbitrary and

prejudicial and denied him effective assistance of counsel, as a result of inconvenience. Dotson further alleges that the multi-count indictment and, specifically, the joinder of the marijuana and cocaine conspiracy charges in Count One deprived him of a fair trial. In addition, pre-indictment delay as to Counts One, Four and Five allegedly violated his due process rights. Dotson did not raise these objections at any stage of the criminal proceeding, including the direct appeal.

Rule 12(b), (f) of the Federal Rules of Criminal Procedure expressly provides that failure to raise defenses and objections based on defects in the institution of the prosecution, nonjurisdictional defects in the indictment, and requests for severance of charges prior to trial constitutes a waiver. Objections based upon the failure of an indictment to show jurisdiction or to charge an offense are not waived. United States v. Prince, 868 F.2d 1379, 1383 (5th Cir. 1989) ("When an indictment is challenged for the

first time on appeal, only failure to charge an offense may be asserted because all nonjurisdictional defects are waived"). Rule 12(b) clearly applies to Dotson's claims regarding the grand and petit jury arrays. Shotwell Mfg. Co. v. United States, 371 U.S. 341, 362-63, 9 L.Ed.2d 357, 372-73 (1963) (objection to the selection of the petit jury array, as well as the grand jury array, is waived under Rule 12(b)(2) [now Rule 12(b) and (f)] if not raised before trial); United States v. Jobe, 487 F.2d 268, 270 (10th Cir. 1973) (objection to jury panel selected from a petit jury array from only one division and not the entire district raised on appeal but not made prior to trial was waived under Rule 12). The alleged indictment defects also fall within the scope of Rule 12(b). United States v. Rox, 692 F.2d 453, 454 (6th Cir. 1982) (misjoinder of charges in the indictment asserted on the third day of trial, absent a pretrial motion for severance, is precluded on appeal). See 1 Wright, Federal Practice and Procedure,

Criminal § 193 at 699 (1982) (indictment defects under Rule 12(b)(2) include irregularities in obtaining the indictment).

Rule 12 governs not only the criminal proceeding but also collateral review. Davis v. United States, 411 U.S. 233, 242, 36 L.Ed.2d 216, 224-25 (1973) (Rule 12 governs an untimely claim of grand jury discrimination in a § 2255 proceeding); United States v. Johnson, 679 F.2d 54, 57 (5th Cir. 1982) (threshold inquiry on a claim of the prosecution's enhancement of the indictment in a § 2255 motion is whether the defendant properly preserved the error prior to trial pursuant to Rule 12(b)).

Under Rule 12(f) the court may grant relief from the waiver "for cause shown." when the attack on an indictment is first raised in a § 2255 motion, the court "can consider the challenge only in exceptional circumstances." United States v. Prince, 868 F.2d at 1384. The Fifth Circuit has held that a § 2255 movant who failed to raise a

Rule 12(b) objection before trial must show both "cause excusing his double procedural default" and "actual prejudice" resulting from the alleged error. United States v. Johnson, 679 F.2d at 57 (quoting United States v. Frady, 456 U.S. 152, 167, 71 L. Ed. 2d 816, 830 (1982)). See Davis v. United States, 411 U.S. at 243-44, 36 L.Ed.2d at 225-26. Dotson offers no explanation for his failure to object to the selection and composition of the grand jury and petit jury arrays and the indictment until long after his trial, verdict, sentence, and direct appeal. Dotson makes no claim of ineffective assistance of counsel on the ground of procedural default under Rule 12(b). Even if cause were alleged, Dotson makes only conclusory allegations that the alleged defects were prejudicial. See United States v. Frady, 456 U.S. at 170, 71 L.Ed.2d at 832 (alleged errors must not merely create a possibility of prejudice but work to the movant's "actual and substantial disadvantage, infecting his entire trial with

error or constitutional dimensions").

Regardless of the alleged racial discrimination, there was sufficient evidence against Dotson at trial. With regard to the indictment, the court finds that the two conspiracy charges in Count One and the remaining counts were sufficiently related so as to justify a single trial. The allegation of a three-year pre-indictment delay as to Count One is groundless since Count One expressly charges an ongoing conspiracy to the date of the indictment. The nineteen-month delay as to Count Four and seventeen-month delay as to Count Five would not have warranted dismissal, particularly in light of the ongoing nature of the investigation and the filing of the indictment two months after the most recent alleged offense. Dotson's claims of ineffective assistance of counsel as a result of the inconvenient trial setting in Oxford instead of Greenville and violation of the district's jury plan are clearly frivolous. In addition, the trial site was properly determined by the court in its

discretion and was not challenged by Dotson prior to this proceeding.

II. Exclusion of Blacks from Petit Jury

Dotson alleges that the prosecution's use of peremptory challenges was racially discriminatory. Five of the government's six peremptory challenges applied to prospective black jurors. Dotson was tried by a jury of eleven white jurors and one black juror. Dotson's counsel objected during the selection process that the government had exercised challenges on the basis of race and moved to strike the jury panel and/or set aside the government's preremptory challenges until the entire jury was selected. After the jury selection, Dotson's attorney amended the motion to object to the racial composition of the jury, including the four white alternate jurors. The court announced that it reserved ruling to consider the details of and reasons for the challenges and the results. The court held a hearing after

the jury verdict was returned and denied Dotson's motion to strike.

The United States Supreme Court has held that use of peremptory challenges to strike prospective black jurors violates equal protection if racially motivated. Batson v. Kentucky, 476 U.S. 79, 90 L.Ed. 69 (1986). Batson applies retroactively to state and federal cases pending on direct review or not yet final on April 30, 1986, when Batson was decided. Griffith v. Kentucky, 479 U.S. 314, 328, 93 L.Ed.2d 649, 661 (1987); Proctor v. Butler, 831 F.2d 1251, 1254 (5th Cir. 1987). Dotson was convicted on October 23, 1985. The decision affirming the convictions was rendered on May 13, 1987 followed by a rehearing on July 1, 1987. Therefore, Dotson's objection falls within the mandate of Batson.

Dotson objects not only to the government's use of peremptory challenges but also to the court's procedure for ruling on the motion to strike. However, Dotson did not raise these issues on direct appeal and

thus may have waived them. See United States v. Prince, 868 F. 2d at 1382-83 (conflict in the Fifth Circuit as to the applicability of the cause and prejudice standard or deliberate bypass standard to waiver of constitutional issues in § 2255 proceedings). In any event, the court finds that the Batson claims have no merit.

Dotson alleges that the hearing at the conclusion of the trial was untimely and inadequate. The Supreme Court in Batson held that, upon a prima facie showing of intentional discriminatory selection of the petit jury, the prosecution must articulate a neutral explanation for its peremptory challenges. However, the Court expressly declined "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges" and "to instruct these courts how best to implement our holding." 476 U.S. at 99 n.24, 90 L.Ed.2d at 89-90 n.24. The Court in Batson held that "the trial court should consider all relevant circumstances" in

deciding whether the defendant has made the requisite prima facie showing. 476 U.S. at 96, 90 L.Ed.2d at 88. The prosecutor accepted one black juror and did not use peremptory challenges to remove only blacks. In any event, the court required the prosecutor to explain the reasons for striking certain blacks.

The prosecutor explained the government's method of investigating prospective jurors and the specific reason underlying each peremptory challenge in dispute. The prosecutor explained that the challenges were based upon information from or opinions of sheriffs and other elected officials in the prospective jurors' counties as follows:

(1) opinion of the sheriff's office and county attorney that prospective juror no. 12 (G-1) was "not a reliable juror" and "likely to turn a drug dealer loose";

(2) opinion of sheriff and law

enforcement officers that prospective juror no. 14 (G-2) would be "very fearful" in this type of case;

(3) information from a sheriff and black deputy sheriff that prospective juror no. 19 (G-4) had been arrested for raping his daughter and could not read well;

(4) information from local officers that the family of prospective juror no. 28 (G-6) was constantly in trouble with the law and had disturbance calls approximately every month.

The jury information sheet indicated that prosepective juror no. 15 (G-3) could not read and the prosecutor thought that he would not be an ideal juror since the criminal action involved numerous documents. The prosecutor accepted a black junior college counselor whom he described as "the most educated person on the jury" and "the most dominant looking juror" and whom he anticipated would be the foreman.

Dotson's counsel argued that the government's use of five peremptory challenges on blacks "effectively prevented us from having any type of reasonable cross-section. . . of a racially balanced jury." The court found that very good reasons existed to challenge the five black prospective jurors and the government exercised its challenges without any racial motivation in an attempt "to get the most intelligent, objective jury possible." The court now finds that the prosecutor articulated "a neutral explanation related to the particular case to be tried," as required under Batson, 476 U.S. at 98, 90 L.Ed.2d at 88.

III. Jury Instructions

Dotson alleges that the jury instructions on Counts One, Two, and Three are improper, incomplete and prejudicial. Dotson alleges that a lesser included offense instruction should have been given and that the conspiracy instruction should have been

supplemented. However, he did not object or request such additions at trial nor did he assert the omissions or errors on direct appeal. Rule 30 of the Federal Rules of Criminal Procedure entitled "Instructions" provides in pertinent part:

> No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the ground of the objection.

The United States Supreme Court has held that the "cause and actual prejudice" standard applies to collateral review of "trial errors to which no contemporaneous objection was made." United States v. Frady, 456 U.S. 152, 167, 71 L.Ed.2d 816, 830 (citing Davis v. United States, 411 U.S. 233, 36 L.Ed. 2d 216 (1973), and Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594 (1977). Dotson does not allege any cause for his failure to raise any objection at trial or on direct appeal and makes no claim of ineffective assistance of counsel regarding

this default. The Supreme Court applied the well-settled test for determining actual prejudice resulting from erroneous jury instructions on collateral review as follows:

> whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, not merely whether the instruction is undesirable, erroneous, or even universally condemned.

Id. at 169, 71 L.Ed.2d at 831 (quoting Henderson v. Kibbe, 431 U.S. 145,, 154, 52 L.Ed.2d 203, 212 (1977)). Any degree of prejudice must be "evaluated in the total context of the events at trial." Id.

Dotson suffered no actual prejudice since the allegations of instruction omissions or errors have no merit. The conspiracy instruction is not inadequate or misleading. The allegation that the expert witness instruction should have followed the tax evasion instructions instead of the instruction on the cocaine charge (Count Ten) is frivolous. Dotson complains that the jury should have been instructed of the lesser included offense of willful failure to pay

taxes under 26 U.S.C. § 7203, with regard to the tax evasion charges. Due process requires a lesser included offense instruction "only when the evidence warrants such an instruction." Hopper v. Evans, 456 U.S. 605, 611, 72 L.Ed.2d 367, 373 (1982). A federal criminal defendant is entitled to such an instruction "if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." Keeble v. United States, 412 U.S. 205, 208, 36 L.Ed.2d 844, 847 (1973). See Rule 31(c) of Federal Rules of Criminal Procedure. A lesser included offense instruction would not have been proper under the facts of this case.

A § 2255 proceeding is not a substitute for direct appeal. United States v. Frady, 456 U.S. at 165, 71 L.Ed.2d at 828. "As a general rule, improper jury instructions are not cognizable in a § 2255 proceeding." Catches v. United States, 582 F.2d 453, 458 n.11 (8th Cir. 1978). The alleged

instruction errors or omissions clearly did not render the trial unfair or result in a "complete miscarriage of justice." Id. at 458 n.11, 459 (quoting Hill v. United States, 368 U.S. 424, 428, 7 L.Ed.2d 417, 421 (1962)).

IV. Inadmissible Evidence

Dotson alleges that admission of government exhibit no. 29, Supplemental Report of Interview of I.V. Young, deprived him a fair trial. Dotson assigned the admission as error on direct appeal which the court initially rejected. On rehearing the court held that the exhibit was inadmissible as hearsay but that the erroneous admission was harmless. Issues raised and decided adversely to the defendant on direct appeal cannot be relitigated on collateral review. Buckelew v. United States, 575 F.2d 515, 517-18 (5th Cir. 1978); 3 Wright, Federal Practice and Procedure, Criminal § 593 at 439 n.26 (1982). Therefore, this issue is not reviewable under § 2255.

V. Prosecutorial Misconduct

Dotson alleges that certain remarks made by the prosecutor deprived him of a fair trial. Again, Dotson made no objection to these remarks at trial nor did he assign them as error on direct appeal. He does not allege any cause for his default and makes no claim of ineffective assistance of counsel regarding this default. An examination of the record fails to reveal that any prejudice resulted from the statements complained of. United States v. Frady, 456 U.S. at 167-68, 71 L.Ed.2d at 830 ("cause and actual prejudice" standard). The statement did not infect the entire trial with unfairness so as to constitute denial of due process. In light of the strong evidence against Dotson and the context of the statements, there is no reasonable probability that the verdict might have been different had the statements not been made. See Rogers v. Lynaugh, 848 F.2d 606, 609 n.7 (5th Cir. 1988). The prosecutor's reference to Dotson's lifestyle and possessions in the opening statement was

consistent with the evidence and his statement of what the government intended to prove was not improper. Dotson alleges that the prosecutor falsely identified government witness Pearson as a government agent-employee to distinguish him from a government informant. In opening statement and closing argument the prosecutor referred to Pearson as "a special employee" which is consistent with Agent Anderson's testimony and Pearson's testimony that he was contacted to do undercover work. The prosecutor's comment in closing argument that Dotson was not supposed to have firearms and his question, whether the jury had ever seen $90,000 in cash, were not so unduly prejudicial as to rise to the level of constitutional error. On direct appeal the Fifth Circuit found that the erroneous admission of evidence of $90,000 from an unreasonable search and seizure was harmless error.

VI. Judicial Remark

Dotson alleges that the trial judge's

statement to the jury panel that the case involved "cocaine, marijuana, and other drugs" showed unlawful trial prejudice. Dotson did not raise this issue on direct appeal. The Fifth Circuit has held:

> Unless they amount to constitutional violations, prejudicial comments and conduct by a judge in a federal criminal proceeding are not proper subjects of collateral attack . . . and are waived if not brought up on direct appeal. . . .

Buckelew v. United States, 575 F.2d at 528 (cites omitted).

VII. Remaining Claims in Second Motion

The allegation of inconsistent verdicts has no merit. Dotson alleges that the sentences on Counts Four through Nine (distribution and possession with intent to distribute) to run consecutively to the sentence on the conspiracy count violate the Double Jeopardy Clause of the Fifth Amendment and the current sentencing guidelines. Dotson filed a Rule 35 motion which was denied. In any event, this claim is frivolous since the sentencing guidelines

were not in effect at the time of Dotson's sentencing and the counts constitute separate and distinct offenses. The allegation of the government's non-disclosure of evidence pertaining to the tax evasion charges is unfounded. Dotson makes a conclusory allegation of newly discovered evidence of his whereabouts on dates alleged in Counts Six and Eight -- a hotel receipt and unidentified evidence of Dotson's attendance at his father's funeral and burial. This claim is frivolous. The allegation that certain pages of the trial transcript are missing, thereby denying Dotson his right to appeal, is groundless. The trial transcript is complete.

VIII. Ineffective Assistance of Counsel

Dotson's first motion alleges ineffective assistance of counsel at his trial which is wholly unsupported by the record. This constitutional claim was not raised on direct appeal and thus may be waived. See United States v. Prince, 868

F.2d at 1382-83. Dotson charges that his attorney failed to properly object to the admission of Agent Baker's testimony which the Fifth Circuit on direct appeal addressed and found to be proper. Dotson also complains that his attorney failed to request excision of prejudicial portions of an exhibit. The Fifth Circuit in rehearing held that admission of the document was harmless error. The claims that the trial attorney should have attacked the indictment for lack of jurisdiction, the severity of the sentence, and the conviction on the conspiracy count as inconsistent with Dotson's acquittal on Count Ten, have no merit. None of the allegations of ineffective assistance of counsel meet the Strickland requirements that

(1) counsel's performance was deficient in that it fell below an objective standard of reasonable professional service; and

(2) this deficient performance

> prejudiced the defense such that there is a reasonable probability that the outcome of the trial has been undermined and the result would have been different.

Strickland v. Washington, 466 U.S. 668, 687-88, 694, 80 L.Ed.2d 674, 693, 698 (1984). On the contrary, Dotson's trial counsel was an experienced and capable trial attorney.

Conclusion

All the errors urged by Dotson "'have been previously decided on direct appeal, contain no constitutional violation, or lack support in the record.'" United States v. Johnson, 679 F.2d at 59. For the foregoing reasons, the motion and the file and records of the case conclusively show that the prisoner is entitled to no relief.

An order in accordance with this memorandum opinion will issue.

THIS, the 22nd day of March, 1990.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE

RULES - SECTION 2255 PROCEEDINGS

Rule 2. Motion

(a) Nature of application for relief. If the person is presently in custody pursuant to the federal judgment in question, or if not presently in custody may be subject to such custody in the future pursuant to such judgment, the application for relief shall be in the form of a motion to vacate, set aside, or correct the sentence.

(b) Form of motion. The motion shall be in substantially the form annexed to these rules, except that any district court may by local rule require that motions filed with it shall be in a form prescribed by the local rule. Blank motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the movant and of which he has or, by the

exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

(c) Motion to be directed to one judgment only. A motion shall be limited to the assertion of a claim for relief against one judgment only of the district court. If a movant desires to attack the validity of other judgments of that or any other district court under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate motions.

(d) Return of insufficient motion. If a motion received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the movant, if a judge of the court so directs, together with a statement of the reason for its return. The

clerk shall retain a copy of the motion. (As amended Pub. L. 94-426, § 2(3), (4), Sept. 28, 1976, 90 Stat. 1334; Apr. 28, 1982, eff. Aug. 1, 1982.)

Rule 4. Preliminary Consideration by Judge

(a) Reference to judge; dismissal or order to answer. The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge of the district in accordance with the procedure of the court for the assignment of its business.

(b) Initial consideration by judge. The motion, together with all the files, records, transcripts, and correspondence

relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

Rule 8. Evidentiary Hearing

(a) Determination by court. If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded

record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.

(b) Function of the magistrate.

(1) When designated to do so in accordance with 28 U.S.G. § 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the motion, and submit to a judge of the court proposed findings and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of

the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject or modify in whole or in part any findings or recommendations made by the magistrate.

(c) Appointment of counsel; time for hearing. If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the proceeding if the interest of justice so requires.

(As amended Publ. L. 94-426, § 2(6), Sept. 28, 1976, 90 Stat. 1335; Publ.L. 94-577, § 2(a)(2), (b)(2), Oct. 21, 1976, 90 Stat. 2730, 2731.)

APPENDIX F

United States Court of Appeals

Fifth Circuit

Office of the Clerk

July 5, 1990

GILBERT F. GANUCHEAU
CLERK

TO: Counsel for Appellee
No. 90-1243 - USA v. Dotson

DC# WC89-32-B (CR #CRG85-47)

In regards to the case identified above, the following motion has been filed: APPELLANT'S MOTIONS FOR: RENEWED APPLICATION FOR BAIL, JUDICIAL NOTICE OF COURT RECORDS AND PROCEEDINGS, JUDICIAL NOTICE OF JURY VENIRE PANEL AND PETIT JURY IN USA V. LANCE, AND JUDICIAL NOTICE OF JURY SELECTION REPORTS
This motion will be presented for ruling without oral argument on this date:

July 12, 1990

Any response to the motion must be filed by opposing counsel on or before that date to be considered in the ruling.

The date shown above indicates when the matter will be forwarded for ruling and does not mean that any action will be completed by then. Counsel should allow at least ten (10) days thereafter before inquiring about the Court's ruling.

Very truly yours,
GILBERT F. GANUCHEAU, Clerk

By:_____
Deputy Clerk

/JB
Mr. Harden King
Mr. Alfred E. Moreton

P.S.to counsel filing Motion: If this block is checked,please forward a certificate of interested persons as required by Local Rule 27.5 within the foregoing time period.

MOT-1
Ev. 7/85

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

NO._____

FREDERICK LEON DOTSON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PROOF OF SERVICE

I, Harden King, Esquire, do swear or declare that on this date, March 1, 1991, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

(A) Robert Q. Whitwell (3 copies)
United States Attorney
Alfred E. Moreton III
Assistant United States Attorney
Northern District of Mississippi
Post Office Drawer 886
Oxford, Mississippi 38655

(B) Kenneth W. Starr (3 copies)
Solicitor General
Department of Justice, Room 5143
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Harden King
Harden King, Affiant

Subscribed and Sworn to Before Me
this 27 day of February, 1991.

Linda A. Smith
Notary Public in and for said
County and State
Leon Florida

(2)

No. 90-1437

FILED
MAY 6 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

FREDERICK LEON DOTSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in dismissing petitioner's motions for collateral relief under 28 U.S.C. 2255 without an evidentiary hearing, the district court denied petitioner a fair opportunity to demonstrate cause for his prior failures to present claims raised in the motions and resulting prejudice.

2. Whether the district court erred in finding that there were legitimate nondiscriminatory reasons for the prosecutor's peremptory challenges to some black jurors.

3. Whether a transfer of venue from one division in the Northern District of Mississippi to another division in the same district constituted purposeful discrimination on the basis of race.

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No. 90-1437

FREDERICK LEON DOTSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A20), which is noted at 912 F.2d 1466 (Table), and an order on rehearing (Pet. App. A1-A2) are not reported. The opinion of the district court (Pet. App. A22-A44) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1990. An order modifying the court of appeals' opinion and otherwise denying a petition for rehearing was entered on November 1, 1990. Pet. App. A1-A2. The petition for a writ of certiorari was filed on January 30, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Mississippi, petitioner was convicted on one count of conspiracy to possess and distribute cocaine and marijuana, in violation of 21 U.S.C. 846; two counts of attempted tax evasion, in violation of 26 U.S.C. 7201; and six counts of possessing and distributing marijuana, in violation of 21 U.S.C. 841(a). The district court sentenced petitioner to a total of 15 years' imprisonment, to be followed by four years of special parole, and fined him $70,000. Gov't C.A. Br. 1-2. On direct appeal, the court of appeals affirmed. 817 F.2d 1127, as modified, 821 F.2d 1034 (1987). The petition seeks further review of the denial of petitioner's motions for collateral relief under 28 U.S.C. 2255.

1. Petitioner filed two Section 2255 motions. The first alleged that his trial counsel had been ineffective in certain respects. A second motion, filed shortly thereafter, advanced more than 20 additional grounds. See Pet. App. A42; C.A. Record Excerpts, Doc. 8. The district court considered both motions together and denied them without a hearing. Pet. App. A22-A44. The court specifically addressed and rejected each of petitioner's claims, concluding that they "have previously been decided on direct appeal, contain no constitutional violation, or lack support in the record." *Id.* at A44.

Three of petitioner's claims are material to his request for this Court's review; the facts relevant to those claims are as follows:

a. More than a month before petitioner's trial, the district court entered an order transferring the case from Greenville, in the Greenville Division of the Northern District of Mississippi, to Oxford, in the Western Division of the same district. Gov't C.A. Br. 7. Petitioner did not object to the transfer or move for a change of venue, nor was the transfer challenged on direct appeal. *Ibid.*

In his second Section 2255 motion, petitioner alleged for the first time that he had been prejudiced by the transfer of the case. He argued that because 58% of the residents of the Greenville Division are black and 30% of the residents of the Western Division are black, the transfer had the unconstitutional effect of excluding blacks from the jury. C.A. Record Excerpts, Doc. 8, at 1-2. Petitioner also argued that the transfer was arbitrary and caused substantial inconvenience to trial counsel and to defense witnesses. *Id.* at 5.

The district court held that, to the extent petitioner was challenging the effect of the transfer on the petit jury array, the claim was barred by Fed. R. Crim. P. 12(b). A challenge to the petit jury array, the court explained, is among the motions that Rule 12(b) requires to be made before trial, and the rule governs collateral review in the absence of a showing of "both 'cause excusing his double procedural default' and 'actual prejudice' resulting from the alleged error." Pet. App. A24-A27. The court determined that petitioner had shown neither cause nor prejudice. *Id.* at A27-A28. The court found that petitioner's assertion that the transfer had unjustifiably inconvenienced trial counsel and defense witnesses was "clearly frivolous," explaining that "the trial site was properly determined by the court in its discretion and was not challenged by [petitioner] prior to this proceeding." *Id.* at A28-A29.

b. When petitioner's case was tried, *Batson* v. *Kentucky*, 476 U.S. 79 (1986), was pending before this Court but had not yet been decided. During jury selection, the prosecutor used five of his six peremptory challenges against blacks. The sixth peremptory challenge was used against a white. The jury ultimately consisted of 11 whites and one black. During jury selection, petitioner's trial counsel moved to strike the jury panel or set aside the prosecutor's peremptory challenges, arguing that those challenges were racially motivated and that their effect was to deny petitioner and

his co-defendant a racially balanced jury. Gov't C.A. Br. 9-10.

The district court reserved ruling on the motion until after the trial. At that time, the prosecutor volunteered the reasons for his peremptory challenges. He explained that because the case involved tax offenses as well as drug offenses, he sought jurors from particular backgrounds. To that end, he had obtained information on as many potential jurors as he could from sheriffs and elected officials in the counties from which the venire was drawn. The prosecutor then advised the court of the information—and its source—underlying each of his peremptory challenges. Gov't C.A. Br. 10; C.A. Record Excerpts, Doc. 7, at 1431-1432.

The government's first strike, of a black ambulance driver, was based on information obtained from the sheriff and county attorney of the juror's county that he "was not a reliable juror," and "would be likely to turn a drug dealer loose." The subject of the government's second strike was a black woman who lived on the border between two counties. Law enforcement officers in both counties advised that in the instant case "she would be very fearful and might not make a good juror." The government's third strike was exercised against a black man after two black police officers in his home county stated their belief that "he perhaps would not make a good juror." In addition, although the juror's information sheet stated that he could not read, he did not acknowledge that fact during *voir dire*. Gov't C.A. Br. 10-11; C.A. Record Excerpts, Doc. 7, at 1433-1434.

The government next struck a black man who, according to information provided by the sheriff and a black deputy sheriff in his home county, had been arrested for raping his daughter and, in addition, could not read well. The subject of the government's fifth strike was a white woman whose son, according to the sheriff in her county, "had been involved in drugs," and who "might have bad feelings

against narcotics agents." The government exercised its sixth strike against a black woman whose family, local police officers had said, "was constantly in trouble with the law" and "had disturbance calls about every month." The officers felt that the woman "would not make a good juror." Gov't C.A. Br. 11; C.A. Record Excerpts, Doc. 7, at 1435-1437.

In the course of his statement, the prosecutor observed that the most desirable juror from the government's standpoint was a black college counselor who was well educated and appeared to have a dominant personality. The prosecutor also noted that 17 of the government's 32 witnesses were black, including the case agent from the Mississippi Bureau of Narcotics. Gov't C.A. Br. 10; C.A. Record Excerpts, Doc. 7, at 1431, 1436-1437.

The district court invited defense counsel to respond to the prosecutor's statement. Without questioning the validity of the prosecutor's representations, defense counsel renewed the motion and argued that the government's peremptory challenges "effectively prevented us from having any type of reasonable cross-section of racial—of a racially balanced jury." C.A. Record Excerpts, Doc. 7, at 1438.

The district court denied the motion. The court found (Gov't C.A. Br. 11-12; C.A. Record Excerpts, Doc. 7, at 1438-1439):

> All right. It appears to the Court that the challenges exercised by the Government were not done with any racially motivated intent to deprive either of these Defendants of a fair trial, that there were very good reasons existing to challenge these five blacks, who were challenged, and that the government was merely carry[ing] out its duty in trying to get the most intelligent, objective jury possible to hear this case, and there was no prejudice whatsoever in the exercise of the challenges as they were exercised.

Petitioner's trial counsel renewed his challenge to the government's use of peremptory challenges in a motion for

a new trial. The district court denied the motion. Gov't C.A. Br. 12. On appeal, petitioner was represented by new counsel. Although *Batson*'s presence on this Court's docket had been discussed during the colloquy on petitioner's motion and petitioner's counsel on direct appeal was handling a similar case then pending in the Fifth Circuit,[1] petitioner did not advance a *Batson* claim on direct appeal.

Petitioner renewed his *Batson* claim in the second of his Section 2255 motions and argued, for the first time, that the procedure for determining that motion had been deficient. The district court observed that petitioner may have waived his claims by failing to raise them on appeal, but held that those claims had no merit in any event. Pet. App. A30-A31. The district court noted that *Batson* does not require the courts to employ any particular procedures in determining whether a prosecutor has discriminated on the basis of race in the exercise of peremptory challenges, and it reviewed the prosecutor's reasons for striking particular jurors and its prior finding that the strikes were motivated by an attempt to "get the most intelligent, objective jury possible." *Id.* at A32-A34. The court concluded that "the prosecutor articulated 'a neutral explanation related to the particular case to be tried,' as required under *Batson*." *Id.* at A34.

c. The first of the Section 2255 motions argued that petitioner's trial counsel had been ineffective in certain respects—specifically, by failing to object to certain testimony, by failing to seek exclusion of portions of a document admitted into evidence, and by failing to advance legal arguments going to the sufficiency of the indictment, the sentence, and an alleged inconsistency in the verdict. See

[1] Petitioner's attorney on direct appeal, Robert Glass, was the attorney for the appellant in *United States* v. *Leslie*, 759 F.2d 366 (1985), on reh'g en banc, 783 F.2d 541 (5th Cir. 1986), vacated, 479 U.S. 1074, on remand, 813 F.2d 658 (5th Cir. 1987).

Pet. App. A43. The court found that those ineffective-assistance claims were "wholly unsupported by the record"; that none of the asserted deficiencies in trial counsel's performance satisfied the standards established by *Strickland* v. *Washington*, 466 U.S. 668, 687-688, 694 (1984), for such claims; and that trial counsel "was an experienced and capable trial attorney." Pet. App. A42-A44.

2. The court of appeals affirmed the dismissal of petitioner's Section 2255 motions. Pet. App. A1-A2, A3-A20. At the outset, it rejected petitioner's contention that the district court erred in denying his Section 2255 motions without a hearing. The court of appeals noted that no hearing is required if "the motion and files and the records of the case conclusively show that the prisoner is entitled to no relief," and, based upon its analysis of each of petitioner's claims, it concluded that petitioner was "clearly entitled to no relief." Pet. App. A5-A6.

With respect to the intra-district transfer, the court noted that petitioner had "'no right to trial within a particular division in a district,' and [that] the trial judge has broad discretion in making a transfer." Pet. App. A7. Petitioner failed to identify any respect in which the transfer caused his trial counsel's performance to be deficient, the court of appeals continued, and petitioner had waived the claim in any event by failing to raise it prior to trial. *Id.* at A7-A8.

The court of appeals set forth its grounds for rejecting petitioner's *Batson* claim in an order on rehearing. Pet. App. A1-A2 (replacing *id.* at A8-A9). In that order, the court noted that on direct appeal petitioner had not challenged the prosecution's use of peremptory strikes, the racial composition of his petit jury, or the timing of the trial court's *Batson* inquiry. *Id.* at A2. The court held that because petitioner had failed to demonstrate cause for that procedural default and resulting prejudice, the claim could not be raised on collateral review. *Ibid.*

The court of appeals addressed on the merits, and rejected, the particular claims raised in petitioner's first Section 2255 motion regarding the ineffectiveness of his trial counsel. Pet. App. A17-A20. The court declined, however, to consider petitioner's contentions, advanced for the first time in the Section 2255 appeal, that his trial counsel had been ineffective in failing to advance the various claims set forth in his second Section 2255 motion and that his counsel on direct appeal had been ineffective. Pet. App. A17.

ARGUMENT

1. Petitioner contends that the summary dismissal of his Section 2255 motions denied him an adequate opportunity to demonstrate cause excusing his failure to preserve claims of error advanced in the motions and to show prejudice flowing from those alleged errors. Pet. 8-12.

Section 2255 provides, in pertinent part, that the court shall grant a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." Similarly, Rule 4(b) of the Rules Governing Proceedings under Section 2255 provides that "[i]f it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the [court] shall make an order for [the motion's] summary dismissal." When a court considers whether summary dismissal is warranted, "the allegations of the motion need not be accepted to the extent that they are contradicted by the court's own records." 3 C. Wright, *Federal Practice and Procedure* § 599, at 492 (2d ed. 1982). See *United States* v. *Yearwood*, 863 F.2d 6, 7 (4th Cir. 1988); *Shraiar* v. *United States*, 736 F.2d 817, 818 (1st Cir. 1984). Unsupported generalizations and claims decided on direct appeal also do not call for a hearing. *United States* v. *Fishel*, 747

F.2d 271, 273 (5th Cir. 1984); *United States* v. *Burroughs*, 650 F.2d 595, 599 (5th Cir.), cert. denied, 454 U.S. 1037 (1981); *Aeby* v. *United States*, 409 F.2d 1, 2 (5th Cir. 1969).

In this case, the record of the prior proceedings in the district court and the court of appeals on direct appeal established that petitioner was entitled to no relief from his conviction. The district judge who presided over the prior proceedings in the case also heard petitioner's Section 2255 motions. In a comprehensive opinion, the district court addressed each of petitioner's allegations of prejudicial error in detail and concluded that "the motion and the file and records of the case conclusively show that the prisoner is entitled to no relief." Pet. App. A44. The court of appeals correctly joined in that conclusion. *Id.* at A6.

Petitioner argues that the summary dismissal of his motions denied him the opportunity to show cause and prejudice with respect to his claims. That argument is without merit. First, the courts below did not rely exclusively on petitioner's procedural defaults in rejecting his claims. In many instances, the courts addressed those claims on their merits and found them to be insufficient as a matter of law. See, *e.g.*, Pet. App. A6-A8, A11-A12, A13-A20. No showing of cause and prejudice could have entitled petitioner to relief on those claims.

Second, although petitioner now argues that the ineffectiveness of his prior attorneys should excuse his untimely assertions of various claims, neither of his Section 2255 motions alleged that counsel had been ineffective in failing to present those claims at an earlier stage. Petitioner's first Section 2255 motion alleged only that petitioner's trial counsel had been ineffective in certain specified respects. Both the district court and the court of appeals rejected that claim on the merits. See Pet. App. A17-A20, A42-A44. Petitioner's other Section 2255 motion raised a host of new claims, but did not supplement the prior ineffective

assistance claim (except to suggest, in passing, that counsel had been inconvenienced by the intra-district transfer). It was not until the appeal from the denial of the Section 2255 motions that petitioner argued, for the first time, that his prior appellate counsel had been ineffective and that trial counsel had been deficient in failing to advance the issues raised by the second Section 2255 motion. The court of appeals was not required, on the basis of this belated extension of petitioner's ineffective assistance claim, to reverse the district court's judgment and remand for a hearing.[2]

2. Petitioner also contends (Pet. 13-17) that the district court erred in its handling and disposition of his *Batson* claim.

The court of appeals correctly held that because petitioner did not raise his *Batson* claim on direct appeal, he is not entitled to collateral relief unless he can show both cause for his procedural default and actual prejudice. See *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982); *Murray* v.

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[2] Contrary to petitioner's contention (Pet. 9), none of the cases in which this Court found a hearing necessary involved comparable facts. In *Blackledge* v. *Allison*, 431 U.S. 63, 77-78 (1977), the record was silent as to sentencing concessions allegedly promised to the defendant during secret plea bargaining. In *Sanders* v. *United States*, 373 U.S. 1, 19-20 (1963), the facts upon which the Section 2255 motion was predicated related to the petitioner's mental competence and were outside the record. In *Machibroda* v. *United States*, 368 U.S. 487 (1962), the district court failed to ask whether the defendant wished to make a statement at the time of sentencing, *id.* at 488-489, and this Court specifically noted that "[t]his was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the 'files and records' in the trial court," *id.* at 494.

Petitioner also relies (see Pet. 9-10) on a number of Fifth Circuit decisions. This case does not depart from the standards set forth in those decisions, and, in any event, an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

Carrier, 477 U.S. 478, 489 (1986) (cause and prejudice standard applies to constitutional claims and defaults on appeal); *Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977). As noted, petitioner advanced an ineffective assistance of counsel claim in his first Section 2255 motion, but he did not assert that his attorney on direct appeal had been deficient in failing to pursue the *Batson* claim. His belated challenge to appellate counsel's representation was insufficient, as a matter of law, to establish cause for his failure to preserve the *Batson* issue. Moreover, for the reasons stated by the district court, petitioner's *Batson* claim is without merit. Thus, petitioner could not have been prejudiced by the omission of that claim from his direct appeal, and he is not entitled to collateral relief.

In keeping with the procedures that are now routinely employed to resolve *Batson* claims, the prosecutor put the reasons for his peremptory challenges on the record. The district court determined—both during the trial and in the Section 2255 proceeding—that the prosecutor's peremptory challenges were not motivated by race and that there were "good reasons" to challenge those blacks who were struck from the jury. Those findings are subject to review under the clearly erroneous standard, and in light of the district court's opportunity to observe the prosecution and the jurors in question, the district court's findings are entitled to "great deference." *Batson* v. *Kentucky*, 476 U.S. at 98 n.21; see *United States* v. *Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987). The reasons advanced by the prosecutor in this case were not insufficient, as a matter of law, to rebut petitioner's claim of racial discrimination. See *United States* v. *Williams*, 822 F.2d 512, 515 (5th Cir. 1987); *United States* v. *Forbes*, 816 F.2d at 1010-1011; *United States* v. *Wilson*, 867 F.2d 486, 488 (8th Cir.), cert. denied, 110 S. Ct. 92 (1989).

3. Petitioner also asserts (Pet. 12-13) that the district court's intra-district transfer of the venue of his trial constituted purposeful racial discrimination. As the court of

appeals held, petitioner waived that claim by failing to object to the transfer of the case at any time prior to the filing of his Section 2255 motion, see *United States* v. *Greer*, 600 F.2d 468, 469 (5th Cir.), cert. denied, 444 U.S. 902 (1979). The claim is without merit in any event.

In light of the procedures employed in the Northern District of Mississippi, there is no basis for an inference that race played any role in the transfer. The judges sitting in the Northern District of Mississippi are based at particular courthouses, but hear cases throughout the district. Judge Biggers, who was assigned to preside over the trial in this case, is based in Oxford, Mississippi, in the Western Division of that district. A local rule provides that all criminal jury trials are, unless otherwise specially ordered, held in Oxford. Rule CR-1(E)(6)(e), Rules of the U.S. Dist. Ct. for the Northern District of Miss. (effective June 9, 1980). In this case, the record does not reflect why petitioner's trial was initially set for trial in Greenville or why Judge Biggers transferred the case to Oxford. But in any event, the effect of the transfer was only to return the case to the courthouse in which Judge Biggers is based and in which all criminal jury trials in the district are presumptively set. "[T]here is no right to trial within a particular division in a district," and, under Fed. R. Crim. P. 18, a district judge "has 'broad discretion in determining whether transfer within a judicial district is warranted.'" *United States* v. *Weddell*, 800 F.2d 1404, 1406, on reh'g, 804 F.2d 1343 (5th Cir. 1986). Neither the government nor petitioner objected to the transfer. Even assuming that petitioner's statistics regarding the racial composition of the jury pools in the Greenville and Western Divisions are correct, the facts provide no support whatever for a claim of purposeful racial discrimination.

Numbers alone do not make out a *prima facie* case of purposeful discrimination. See *United States* v. *Jordan*, 893

F.2d 182, 183-184 (8th Cir.), vacated on other grounds, 110 S. Ct. 2581 (1990); *United States* v. *Fuller*, 887 F.2d 144, 146-147 (8th Cir. 1989), cert. denied, 110 S. Ct. 2592 (1990). Rather, "all relevant circumstances" should be considered, *Batson*, 476 U.S. at 96-97, and "[t]here is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups." *Rosales-Lopez* v. *United States*, 451 U.S. 182, 190 (1981). In this case, the Section 2255 motion failed to set forth any facts from which an inference of purposeful discrimination could be drawn, and there was thus no need for further proceedings on petitioner's discrimination claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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